United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20225

FLOYD J. BOYD, APPELLANT

v.

PAUL H. PRESTON,
LUKE MOORE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
OSCAR ALTSHULER,
THEODORE WIESEMAN,
Assistant United States Attorneys.

H.C. 189-66

QUESTIONS PRESENTED

The Governor of the State of Maryland forwarded to the District Court requisition papers charging appellant with the crime of forgery. The requisition papers included an arrest warrant issued by a justice of the peace and an affidavit setting forth the facts of the crime and sworn to by the complaining witness before a notary public. At a hearing before an Associate Judge of the District Court, sitting in an executive rather than a judicial capacity, the complaining witness appeared and testified under oath to the circumstances surrounding the alleged forgery in Maryland. The judge ordered rendition to Maryland. On appeal from the District Court's dismissal of a petition for a writ of habeas corpus, the following questions are presented:

1. Whether the arrest warrant reciting that a complaint had been sworn to by a detective and the victim's testimony before the District Court were sufficient to show that appellant had been "substantially charged" in Maryland with the crime of forgery?

2. Whether appellant can use the writ of habeas corpus to challenge the validity of an arrest that is no longer the basis for his detention?

3. Whether in an interstate rendition proceeding appellant can attempt to prove his innocence of the charge pending in Maryland?

233-703—66

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*Cases chiefly relied on are marked with asterisks.

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20225

FLOYD J. BOYD, APPELLANT

v.

PAUL H. PRESTON, LUKE MOORE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

The instant appeal is from a denial of a petition for a writ of habeas corpus challenging the validity of an order of the District Court, sitting in an executive rather than a judicial capacity, surrendering appellant to Maryland authorities for interstate rendition.

On March 30, 1966, appellant [1] received service of a District of Columbia arrest warrant charging him with being a fugitive from a forgery charge in Maryland. He was presented to a magistrate sitting in the Court of General Sessions and bound over for a hearing in the District Court on April 13, a date on which the formal requisition papers would have arrived from Maryland.[2]

[1] Appellant is also known as Charles J. Boucher. Accordingly, some of the papers in the instant case refer to him by that name, while others refer to him as Floyd J. Boyd.

[2] 23 D.C. Code § 403 confers authority on the Court of General Sessions to issue an arrest warrant on probable cause that a person is a fugitive from another state. Such a warrant serves to detain the person until the demanding state can forward the formal requisition papers that are the basis of interstate rendition proceedings.

On that date appellant appeared before the Honorable William B. Bryant, sitting as the "Governor" of the District of Columbia. The government presented the requisition papers consisting of a demand by the Governor of the State of Maryland that appellant be arrested and surrendered to Maryland authorities; an arrest warrant issued by a justice of the peace on January 13 charging appellant with committing a forgery in Bethesda on November 26, 1965; and an affidavit sworn to before a notary public on April 1 and setting forth the facts of the alleged crime. The arrest warrant recited that a Maryland detective, G. W. Heflin, had sworn to a complaint charging the crime, and the affidavit was sworn to by the victim, Leonard Halik. In addition, the victim appeared in person at the hearing before Judge Bryant, testified to the circumstances of the offense, and identified appellant as the person who committed it (April 13 Tr. 7–16). Appellant offered no evidence in his own behalf. At the conclusion of the hearing, Judge Bryant granted Maryland's request for rendition but stayed his order to allow appellant an opportunity to file a petition for a writ of habeas corpus.[3]

The next day, appellant filed the petition for a writ of habeas corpus involved in the instant case, H.C. 189–66, which is one of ten actions appellant has filed challenging the validity of the rendition proceedings.[4] After a hearing on April 25, the Honorable Alexander Holtzoff denied the petition.

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[3] Since there is no statutory appeal from an executive determination ordering rendition, the settled practice for challenging the validity of a rendition order is by a writ of habeas corpus. See 23 D.C. Code § 401 (c).

[4] The other actions, all of which have been filed *pro se* and two of which have been appealed to this Court, are as follows in chronological order:

1. C.A. 908–66 (*Boyd* v. *United States and Maryland*) a civil suit filed on April 6 to enjoin rendition. Dismissed by the District Court on August 10 and now pending appeal on this Court's miscellaneous docket.

2. C.A. 1080–66 (*Boucher* v. *United States, Maryland, Preston, and Moore*) a civil suit petitioning for an order vacating the judgment of extradition that was filed on April 25 and dismissed the same day.

3. H.C. 200–66 (*Boucher* v. *United States, Maryland, Preston, and Moore*) filed and denied by the District Court on April 26 on the basis of the proceedings in the instant case.

4. H.C. 201–66 (*Boucher* v. *Preston and Moore*) a second habeas corpus filed and denied the same day and for the same reason as H.C. 200–66.

5. C.A. 1400–66 (*Boucher* v. *Halik and Campbell Music Co*) civil suit

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article IV, Section 2, of the Constitution of the United States provides in pertinent part:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Title 18, § 3182, United States Code, provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears

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for damages filed on May 27 against complainant and company owning store involved in the instant case. Dismissed as to Campbell Music Co. on July 1; still pending against Halik.

6. H.C. 255–66 (*Boucher* v. *Preston*) habeas corpus filed and denied on June 7 because of the proceedings in the instant case.

7. H.C. 297–66 (*Boucher* v. *Preston and Moore*) filed and denied on July 6 because of the proceedings in the instant case. District Court denied leave to appeal *in forma pauperis* on July 18 as frivolous over appellant's contention that H.C. 297–66 and the instant case involved different issues. This Court denied leave to appeal on August 31 (see Misc. 2866).

8. H.C. 348–66 (*Boucher* v. *Preston and Moore*) filed on August 18. Decision pending.

9. H.C. 373–66 (*Boucher* v. *Preston and Moore*) filed and denied on August 31 because of the proceeding in H.C. 348–66 and the instant case.

within thirty days from the time of the arrest, the prisoner may be discharged.

Title 23, § 401, District of Columbia Code, provides in pertinent part:

> (a) In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Judge of the United States District Court for the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised Statutes of the United States, "Extradition", and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery
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> * * * * *
>
> (c) No person apprehended in accordance with the provisions of subsections (a) and (b) of this section shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken before the chief judge of the United States District Court for the District of Columbia who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if such person or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the United States attorney for the District of Columbia, a and to the said agent of the demanding State: Provided, however, That nothing contained in this subsection shall prevent such person from waiving his right to appear before the chief judge of the United

States District Court for the District of Columbia and voluntary returning in custody of a proper official to the jurisdiction of the State, Territory, or other possession of the United States which is demanding him.

SUMMARY OF ARGUMENT

I

There is no merit to appellant's contention that Maryland's requisition papers were defective. The Supreme Court has held that a complaint in the demanding state is sufficient, and the legislative history of the governing statute, 18 U.S.C. § 3182, shows that it is sufficient if the demanding state has made a determination that there is probable cause to believe that the accused committed the offense. Therefore, the papers in the instant case, containing an arrest warrant issued by a magistrate and reciting that a complaint had been filed, were sufficient. It is not necessary that the executive of the asylum state made a second finding of probable cause, but in any event, the complaining witness appeared in person and testified at the proceedings in the District Court, providing an ample basis for such a finding.

II

Appellant cannot challenge the validity of his arrest pending arrival of Maryland's requisition papers and the rendition hearing in the District Court; for the rendition hearing has been held and the District Court's order of arrest at the end of that hearing supplants appellant's earlier detention. In any event, the original arrest before the hearing was valid.

III

Appellant's remaining contentions are attempts to litigate his ultimate guilt or innocence of the criminal charge pending in Maryland. In a rendition proceeding, the executive does not rule on the accused's guilt or innocense.

ARGUMENT

I. An arrest warrant issued by a justice of the peace reciting that a detective had sworn to a complaint and the complain-

ing witness's testimony before the District Court were sufficient to show that appellant has been "substantially charged" in Maryland.

Under the Constitution and the implementing statutes, 18 U.S.C. § 3182 and 23 D.C. Code § 401, only two questions are at issue in an interstate rendition proceeding—whether the accused is "substantially charged" with a crime in the demanding state and whether he is a "fugitive" from that state.[5] Appellant contends (App. Br. 16–20) that Maryland's requisition papers were defective in that they did not show that he had been "substantially charged" within the meaning of 18 U.S.C. § 3182, which requires either "a copy of an indictment found or an affidavit made before a magistrate * * * charging the person with having committeed treason, felony, or other crime * * *." The requisition papers were based on an arrest warrant issued by a justice of the peace—who was a magistrate within the meaning of § 3182 [6]—and an affidavit before a notary public. It is true that an affidavit before a notary public is inadequate [7] and that there is authority indicating that an arrest warrant is also insufficient; [8] however, in the circumstances of this case there was compliance with the requirements of § 3182.

The test embodied in the statute is not whether there is probable cause to believe the accused committed a crime in the demanding state, but whether the demanding state's papers indicate that it has begun a criminal prosecution. Thus in the leading case of *In re Strauss*, 197 U.S. 324 (1905), the Supreme Court said (at 331) that in the statute:

> The word "charged" was used in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a

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[5] *E.g.*, *Moncrief* v. *Anderson*, 119 U.S. App. D.C. 323, 325, 342 F. 2d 902, 904 (1964); *Johnson* v. *Matthews*, 86 U.S. App. D.C. 376, 378, 182 F. 2d 677, 679, *cert. denied*, 340 U.S. 828 (1950); *Roberts* v. *Reilly*, 116 U.S. 80, 95 (1885).

[6] *Compton* v. *Alabama*, 214 U.S. 1, 7 (1909).

[7] *Ibid.*

[8] *Bruzaud* v. *Matthews*, 93 U.S. App. D.C. 47, 49, 207 F. 2d 25, 27 (1953) (dictum); *United States ex rel. McCline* v. *Meyerling*, 75 F. 2d 716 (7d Cir. 1934).

> party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge.

In that case the Court held that a sworn complaint, which was an earlier step in the prosecution than an arrest warrant, was an affidavit charging the crime within the meaning of the statute.[9] The legislative history of the statute shows that the purpose of the "indictment" or "affidavit" language was to insure that the prosecution in the demanding state had gone forward to the stage where there has been an investigation into the validity of the charge—which we understand to mean that there has been a determination of probable cause in the demanding state.[10] If this be true, the requisition papers in the instant case were sufficient; for they contain an arrest warrant which recites that a complaint has been sworn to in Maryland and that there have been judicial proceedings before a magistrate which resulted in a finding of probable cause.

Appellant, however, contends in his third argument (App. Br. 26–28) that the papers were defective because they did not allow the executive in this jurisdiction to make its own independent determination of probable cause. Except for two cases of questionable vitality,[11] federal law does not require such a determination in the asylum state. The proceedings in the asylum state are not before a judicial officer. They are before an executive officer—the governor in every jurisdiction except the District of Columbia—who is not expected to resolve an intricate legal issue like probable cause. It is sufficient that

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[9] *Accord, Riley* v. *Colpoys*, 66 App. D.C. 116, 85 F. 2d 282 (1936).

[10] The statute adopted the views expressed in a report by Attorney General Edmund Randolph which President Washington submitted to Congress in 1791. Attorney General Randolph's report contains the requirement of a previous investigation in the demanding state. 2 Moore, *Extradition and Interstate Rendition* §§ 532, 533 (1891).

[11] *Ex parte Hart*, 63 Fed. 249 (4d Cir. 1894) was decided before the Supreme Court's decision in *In re Strauss*, *supra*. A second case, *United States ex rel. McCline* v. *Meyerling*, *supra* note 8, relied on *Hart* and was based on the philosophy that § 3182 should be narrowly construed because it involves important individual rights (at 717), a view in conflict with the Supreme Court's opinion in *Biddinger* v. *Commissioner*, 245 U.S. 128, 132–133 (1917).

the governor determine that a magistrate in the demanding state has made the finding of probable cause.[12] In any event, in the instant case the complainant appeared in person in the District Court and gave sworn testimony from which Judge Bryant could make his own determination of probable cause. The record in this case shows clearly that Maryland has begun a prosecution against appellant and that probable cause exists to believe that he committed the offense.[13]

II. Appellant cannot attack the validity of his arrest pending the rendition hearing because his detention now rests not on that arrest, but on the rendition order at the end of the hearing.

Appellant contends (App. Br. 20–26) that the warrant on which he was arrested pending arrival of the requisition papers from Maryland was defective. Appellant, however, is no longer in custody under that warrant. His detention is now based on

[12] The view expressed in the text, that an accused cannot use an interstate rendition proceeding to attack the correctness of a finding of probable cause in the demanding state, follows from the established rule that since the only issues open are whether the accused was "substantially charged" and a "fugitive", he cannot attack the constitutionality of the proceedings in the demanding state that have taken place before, or which might take place after, rendition. *Johnson* v. *Matthews*, *supra* note 5 (constitutionality of incarceration in demanding state); *Herzog* v. *Colpoys*, 79 U.S. App. D.C. 81, 143 F.2d 137 (1944) (constitutionality of order revoking pardon and committing accused to prison in demanding state); *Sweeney* v. *Woodall*, 344 U.S. 86 (1952) (cruel and unusual punishment in demanding state); *Marbles* v. *Creecy*, 215 U.S. 63 (1909) (unfair trial will occur); *Pearce* v. *Texas*, 155 U.S. 311 (1894) (constitutionality of statute under which indicted); *Hale* v. *Crawford*, 65 F.2d 739 (1d Cir), *cert. denied* 290 U.S. 674 (1933) (exclusion of negros from grand jury). See generally Note, *Extradition Habeas Corpus*, 74 YALE L. J. 78 (1964), criticizing the established rule but concluding (at 125) that although an accused should not be able to attack constitutional infringements prior to the rendition proceedings, he should be able to challenge "prospective irreparable injury."

[13] We call to the Court's attention that in the course of preparing this brief we learned for the first time that on April 5, 1966, after forwarding the requisition papers to this jurisdiction, Maryland authorities did obtain an indictment in the instant case. The existence of such an indictment does not render appellant's attack on the validity of the requisition papers moot; for in order to obtain a rendition order based on the indictment, the government would be required to start again and institute new proceedings.

the order at the end of the rendition proceedings. The cases are clear that an accused cannot attack his original arrest after the requisition papers have arrived and after his original arrest has been supplanted by a valid rendition order.[14] Appellant was not entitled to be released on the warrant so that he could be arrested again a moment later on the rendition order because, to use the words of Mr. Justice Holmes, "This proceeding is not a fox hunt." [15] In any event, such warrants [16] are authorized by 23 D.C. Code § 403 and their constitutionality is beyond dispute.[17] Finally, contrary to appellant's construction of 23 D.C. Code § 401(c), providing that habeas corpus is the vehicle "to test the legality of his arrest," the statute plainly refers to the "arrest" under the rendition order, not the "arrest" pending arrival of the requisition papers.

III. The executive does not rule on an accused's guilt or innocence of the criminal charges in an interstate rendition proceeding.

Appellant also contends that the evidence of his identity as the person who committed the forgery in Maryland was derived from an illegal search and seizure (App. Br. 28–30), and that he should have been afforded an opportunity at the rendition hearing to produce expert testimony to show that the handwriting on the forged checks did not belong to him (App. Br. 30–31). Both contentions go to the issue of his ultimate guilt or innocence of the charge placed against him in Maryland. They are defenses that can be raised at his trial in Maryland but cannot be raised at interstate rendition proceedings in this jurisdiction; for the asylum state does not decide appellant's guilt or innocence.[18]

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[14] *Stallings* v. *Splain*, 253 U.S. 339 (1920) (*held* in removal proceedings case); *Kelly v. Griffin*, 241 U.S. 6 (1916) (*held* in international extradition case).

[15] *Kelly* v. *Griffin*, *supra* note 14, at 13.

[16] The warrant is not at this time part of the record on appeal, although appellant has indicated an intention to add it in a supplemental record.

[17] *Stallings* v. *Splain*, *supra* note 14, at 341; *Burton* v. *New York Cent. R. Co.*, 245 U.S. 315 (1917).

[18] *E.g.*, *Goodale* v. *Splain*, 42 App. D.C. 235, 239 (1914); *Drew* v. *Thaw*, 235 U.S. 432, 439–440 (1914).

CONCLUSION

Therefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.
FRANK Q. NEBEKER,
OSCAR ALTSHULER,
THEODORE WIESEMAN,
Assistant United States Attorneys.

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Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,225

FLOYD J. BOYD,

Appellant,

v.

PAUL H. PRESTON,
LUKE MOORE,

Appellee.

Forma Pauperis Appeal From a Judgment of the

United States District Court for the

District of Columbia

LEGAL AID AGENCY
JOHN A. BRILEY, JR.
Counsel for Appellant
(Appointed by the District Court)

601 Indiana Avenue, N. W.
Washington, D. C. 20004
(783-5700)

QUESTIONS PRESENTED

1. Whether an affidavit made before a Maryland notary public is sufficient to support a warrant of rendition?

2. Whether D.C. Code §23-403 authorizes the issuance of a warrant in blank for the arrest of a fugitive on the uncorroborated recital that a warrant for the arrest of the individual has been received from another jurisdiction?

3. Whether probable cause for the issuance of a state arrest warrant is established when a state police officer swears to information that a named individual did fraudulently make and forge a $150 check with intent to defraud a named individual on a date certain?

4. Whether in an extradition proceeding the Acting Chief Judge of the District Court should have held a hearing to determine the merits of a motion to suppress the alleged product of the illegal search and seizure committed in this District?

5. Whether in an extradition proceeding the Acting Chief Judge should have appointed an expert witness to assist the fugitive on the issue of identification?

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*Cases chiefly relied upon are marked by asterisk.

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TREATISE

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,225

FLOYD J. BOYD,

Appellant,

v.

PAUL H. PRESTON,
LUKE MOORE,

Appellee.

Forma Pauperis Appeal From a Judgment of the
United States District Court for the
District of Columbia

JURISDICTIONAL STATEMENT

On April 13, 1966, the Acting Chief Judge of the United States District Court for the District of Columbia ordered that appellant be surrendered to the State of Maryland. Execution of that order was stayed pending determination of appellant's petition for a writ of habeas corpus.

On April 14, the District Court authorized the filing of appellant's petition and issued the writ, return-

able on April 18. The matter was heard in part on April 18 and concluded on April 25 before Judge Holtzhoff.

On May 10, Judge Holtzhoff ordered that the writ be discharged, the petition dismissed and appellant remanded for surrender to the Maryland authorities. The same day, execution of that order was stayed for a period of 48 hours.

On May 12, Judge Holtzhoff granted the application to proceed on appeal without prepayment of costs. Counsel was appointed by the same order. Preparation of the transcripts of the habeas corpus proceedings and of the extradition proceedings was authorized.

STATEMENT OF THE CASE

Chronology

On December 15, 1965 appellant was arrested in his room at the Washington Hilton Hotel on a charge that he had obtained such accommodation with intent to cheat and defraud the hotel, in violation of D.C. Code §22-1301. There was no warrant involved.

On December 16, 1965, two complaints were filed in the District of Columbia Court of General Sessions designating appellant as defendant. In U.S. No. 11077-65, appellant was charged as described in the preceding paragraph. In U.S. No. 11078-65 appellant was charged with Forgery, in

violation of D.C. Code §22-1401.[1/] Thereafter, appellant was incarcerated in the District of Columbia Jail.

On January 5, 1966, appellant entered a plea of guilty in U.S. No. 11077-65. He was sentenced to serve a term of 120 days with credit for time spent in jail awaiting trial.

On January 13, a preliminary hearing was held in U.S. No. 11078-65, after which appellant was discharged.

On January 13, Edward M.Cashman, Justice of the Peace for Montgomery County, Maryland, issued a state warrant for the arrest of Charles J. Boucher. (See Supplemental Record of the papers filed in the District Court, No. 14-66, Requisition Docket)

On January 26, Detective Israel Michaelson swore to an affidavit in support of an arrest warrant for the

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1/ For the convenience of this Court and in clarification of certain issues, appellant has submitted with this brief a Motion to Supplement the record.

This request includes the following records of the District of Columbia Court of General Sessions:

a) U.S. No. 11077-65, United States v. Floyd J. Boyd, otherwise known as Charles J. Boucher, Unpaid Board Bill;

b) U.S. No. 11078-65, United States v. Floyd Joseph Boyd, otherwise known as Charles J. Boucher, Forgery;

c) U.S. No. 2865-66, United States v. Charles T. Boucher, alias Floyd J. Boyd, Fugitive From Justice.

arrest of Charles T. Boucher alias Floyd Boyd, as well as to a complaint charging that Charles T. Boucher alias Floyd Boyd was a fugitive from justice. Judge Greene of the District of Columbia Court of General Sessions issued U.S. Warrant 381-66, which was physically part of the complaint. This warrant was issued in blank and does not disclose any execution. (See U.S. No. 2865-66 and footnote 1 hereinabove)

On March 30, appellant was brought from the jail to the Court of General Sessions on the fugitive complaint. Counsel was appointed and the matter was continued until April 13, apparently pursuant to the provisions of D.C. Code §23-404, and bond was fixed at $1,000. Appellant did not secure his release on bond.

On March 31, appellant signed his name to a pro se petition for a writ of habeas corpus, and mailed it to the District Court. On April 7, appellant signed his name to a second such petition, and mailed it to the District Court together with an affidavit of indigency, which was sworn to on April 6. (See Record of the pleadings filed in the District Court, Habeas Corpus No. 189-66)

In the meanwhile, on April 1, Mr. Leonard Halik subscribed to an affidavit relating to certain events of November 26, 1965. This affidavit was sworn to before a notary public. (See Supplemental Record)

On April 13, the Court of General Sessions certified the matter in U.S. No. 2865-66 to the District Court

for hearing. The pleadings filed in that matter, however, were not transmitted to the District Court. (See footnote 1)

That same day, a hearing on No. 14-66, Requisition Docket ensued at 2:00 o'clock p.m. before Judge Bryant, Acting Chief Judge of the District Court. Through an informal arrangement between the United States Attorney's office and the Legal Aid Agency, the undersigned counsel was present to represent appellant.

At the conclusion of the hearing, Judge Bryant signed an Order to Surrender appellant, an Order for Arrest of appellant, and a Warrant of Arrest upon Requisition of the appellant.[2/] The Order of Surrender was stayed "pending determination of Habeas Corpus to be filed." (See Supplemental Record)

On April 14, 1966, Judge McGarraghy issued an Order authorizing filing of appellant's petition for a writ of habeas corpus and prosecution of that action without prepayment of costs. It was further ordered that the writ of

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2/ For ease of discussion the three warrants hereinafter will be referred to as the state warrant (warrant of January 13), the fugitive warrant (warrant of January 26), and the requisition warrant (warrant of April 13).

habeas corpus be issued returnable on April 18. By the same order, counsel was appointed to represent appellant.

On April 18, the hearing on the writ ensued before Judge Holtzhoff. The undersigned counsel was appointed to represent appellant and the hearing was continued, at his request, to April 25.

On April 25, the hearing was concluded. Judge Holtzhoff ruled that all contentions raised on behalf of appellant were without merit, and that the writ should be discharged.

On May 10, an Order was signed by Judge Holtzhoff discharging the writ, dismissing the petition and remanding appellant for surrender. That same day, by separate order, execution of the first order was stayed for a period of 48 hours. On May 12, Judge Holtzhoff granted leave to appeal without prepayment of costs, and appointed undersigned counsel. (See Record)

Hearing on the Requisition 3/

At the outset of the hearing, appellant expressed to Judge Bryant his dissatisfaction with "last minute" appointment of counsel (Rq. T. 2-4). (See also Rq. T. 17.) He advanced several arguments pro se.

3/ To preclude confusion, the transcript of these proceedings will be designated "Rq. T."; the transcript of the proceedings on the writ of habeas corpus will be designated "H.C.T."

First, appellant represented that the papers filed in the Court of General Sessions on March 30 were not sufficient to justify his arrest and detention thereafter (Rq. T. 4-5)

Second, appellant represented that any and all evidence that he was the perpetrator of the Maryland offense was obtained through an illegal search and seizure (Rq. T. 6-12, 18).

Third, appellant argued that he should have the benefit of a handwriting expert to contradict the testimony of Mr. Halik (Rq. T. 10, 11).

The only witness to testify was Mr. Leonard Halik. He identified himself to be the manager of the Campbell Music Company in Bethesda (Rq. T. 7). He identified appellant to be the man for whom he had cashed a check on November 26 (Rq. T. 7-8). He identified a check (Rq. T.9) which was received into evidence as Petitioner's Exhibit No. 1 (Rq. T. 13).[4/]

On cross-examination, Mr. Halik testified that he had been asked by Detective Kepler, Bethesda, Maryland, Police Department, to identify from photographs the man who passed the check. Mr. Halik testified that it was a photograph of the appellant, but that there were no names

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4/ For some reason, that Exhibit is not included among the papers transmitted to this Court as the Supplemental Record.

on the photographs shown to him. (Rq. T. 14)

The Hearing on the Writ of Habeas Corpus

Upon being appointed to represent appellant in place of other counsel, the undersigned counsel requested a one-week continuance. While granting the request, Judge Holtzhoff made inquiry of the nature of the matter (H.C.T. 7). Counsel responded that the petition was founded on a contention that appellant had been illegally arrested on March 30 (H.C.T. 8). Judge Holtzhoff indicated that the Court would not consider such issue. (H.C.T. 8-9)

Counsel further responded that the identification of appellant was based on an illegal search and seizure in the District of Columbia. (H.C.T. 9). Judge Holtzhoff indicated that the Court would not consider such issue. (H.C.T. 9-10).

Finally, counsel responded that appellant had requested an opportunity to obtain an expert witness to enable appellant to produce evidence on the issue of identity. When it was pointed out that appellant was requesting the appointment of an expert witness at government expense, the request was denied. (H.C.T. 10).

On April 25, the hearing resumed. Counsel asked for and was granted leave to file an amended petition. (H.C.T. 13). Once again, Judge Holtzhoff inquired what points appellant was raising. (H.C.T. 13). Counsel

responded with the first two arguments described above. (H.C.T. 13 and 20-21). As to each, Judge Holtzhoff ruled that his jurisdiction was limited to the two issues of identity and fugitivity. (H.C.T. 15, 18 and 21).

On the issue of identity, Judge Holtzhoff limited the issue to whether or not appellant was the Charles T. Boucher named in the requisition. (H.C.T. 21).

Counsel thereupon called the attention of Judge Holtzhoff to the insufficiency of the affidavit of Mr Halik (H.C.T. 23). In response, the Assistant United States Attorney called the attention of the Court to the state warrant. Judge Holtzhoff ruled that there was no irregularity in the requisition papers. (H.C.T. 24). The hearing concluded with the Court's ruling that the writ be discharged, the petition dismissed and appellant remanded for surrender (H.C.T. 24-25).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Article IV, Section 2 provides:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched; and the person to be seized.

U.S. Code, Title 18, Section 3182 provides:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor of chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within 30 days from the time of the arrest, the prisoner may be discharged.

D.C. Code, §23-401 provides:

(a) In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Judge of the United States District Court for the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several states are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised

Statutes of the United States, "Extradition", and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

(b) The Chief Judge of the United States District Court for the District of Columbia may also surrender on demand of the executive authority of any State, any person in the District of Columbia charged in such State in the manner provided in subsection (a) of this section with committing an act in the District of Columbia, or in another State, intentionally resulting in a crime in the State whose executive authority is making the demand, even though the accused was not in that State at the time of the commission of the crime, and has not fled therefrom.

(c) No person apprehended in accordance with the provisions of subsections (a) and (b) of this section shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken before the Chief Judge of the United States District Court for the District of Columbia who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if such a person or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the United States attorney for the District of Columbia, and to the said agent of the demanding State: Provided however, that nothing contained in this subsection shall prevent such person from waiving his right to appear before the Chief Judge of the United States District Court for the District of Columbia and voluntarily returning in custody of a proper official to the jurisdiction of the State, Territory, or other possession of the United States which is demanding him.

D.C. Code, §23-403 provides:

Whenever any person shall be found within the District of Columbia charged with any offense committed in any State, Territory, or other possession of the United States, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the governor of such state, territory, or possession, any judge of the Municipal Court for the District of Columbia may, upon complaint on oath or affirmation of any credible witness, setting forth the offense, that such person is a fugitive from justice, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the Municipal Court for the District of Columbia, to answer such complaint.

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

The Maryland Code (1957), Article 68 provides:

Section 3. Each notary public shall have the power of administering oaths according to law in all matters and cases of a civil nature in which a justice of the peace may administer an oath and with the same effect; and a certificate under the notarial seal of a notary public shall be sufficient evidence of his having administered such oath in his character as notary public.

Section 4. A notary shall have power to receive the proof or acknowledgment of all instruments of writing relating to commerce or navigation and such other writings as have been usually proved and acknowledged before notaries public; and to make protests and declarations and testify the truth thereof under his seal of office concerning all matters done by him in virtue of his office.

STATEMENT OF POINTS

1. The arrest of appellant on the requisition warrant was illegal because the affidavit submitted in support thereof was defective.

2. The arrest of appellant on the fugitive warrant was illegal because that warrant was issued in blank and without probable cause.

3. The arrest of appellant on the fugitive warrant was illegal because the state warrant was likewise issued without probable cause.

4. It was error to summarily refuse appellant a hearing on the exploitation vel non of an alleged illegal search and seizure.

5. It was error to refuse to order the appointment of an expert witness to assist appellant on the question of identity.

SUMMARY OF ARGUMENT

ONE. The executive authority of the place of asylum does not have jurisdiction to grant extradition unless there is produced either an indictment or an affidavit. Appellant was not indicted. The affidavit submitted in support of the Governor's requisition is fatally defective because it was not made before a magistrate, and because it was not made before the magistrate who issued the state warrant.

TWO. Appellant was arrested on a fugitive warrant issued by the Court of General Sessions. That warrant did not particularly name or describe the person to be seized, contrary to the Fourth Amendment. Moreover, the fugitive warrant was based on complaint and affidavit of a Metropolitan Police Officer who did not represent his personal knowledge, the source of his information, or the facts and circumstances of the offense. The state warrant was referred to but not filed with the complaint and affidavit. The fugitive warrant was issued without an adequate showing that appellant was charged with an offense in Maryland.

THREE. The state warrant issued for the arrest of appellant was not based on any affidavit. The recital on its face of the underlying basis for its issue does not establish probable cause. There is no indication that the informant had personal knowledge, nor is the source of his information suggested. There is no indication of the facts of the alleged offense.

FOUR. Appellant contended that all identification evidence against him was the fruit of an illegal search and seizure by Metropolitan Police Department officers. This claim was substantially corroborated by the record of events. The delay between the alleged offense committed in Maryland and the issuance of a state warrant for his arrest was from November 26, 1965 to January 13, 1966. In the meantime, appellant had been arrested in this jurisdiction, and charged with a misdemeanor and a felony. The latter charge was dismissed. It was an abuse of discretion for Judge Bryant to refuse to entertain appellant's objection to the identification testimony against him.

FIVE. Appellant was identified by the complainant on the basis of facial recognition only. The complainant verified that the check in question was endorsed in his presence. Appellant claimed that he could refute the identification with the aid of expert testimony. Appellant was denied equal protection of law by the refusal to order the

appointment of an expert witness.

ARGUMENT

ONE. THE ARREST OF APPELLANT UNDER THE WARRANT OF RENDITION WAS ILLEGAL BECAUSE THE REQUISITION PAPERS SUBMITTED BY THE GOVERNOR OF MARYLAND ARE NOT SUPPORTED BY A VALID AFFIDAVIT.

At the conclusion of the extradition proceedings, Judge Bryant signed the necessary papers to effectuate extradition of appellant, upon a determination by the court that the papers were in proper order. (Rq. T. 16). That ruling cannot be sustained.

In the amended petition and in the course of the hearing on the writ of habeas corpus, appellant pointed out the fatal deficiency in the supporting affidavit, viz. that is was not made before a magistrate. Judge Holtzhoff refused to consider the merits of that contention, but it is firmly established that this is sufficient ground for ordering that appellant be released.

The statute governing all extradition prodeedings is 18 U.S.C. §3182. Thereby, the demanding state is commanded to produce either a "copy of an indictment found or an affidavit made before a magistrate." This requirement is essential before the asylum state or district can exercise its jurisdiction over the fugitive.

"It must appear, therefore, to the governor of

the State to whom such a demand is presented, before he can lawfully comply with it, first that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or affidavit, certified as authentic by the governor of the state making the demand;..." Roberts v. Reilly, 116 U.S. 80, 95 (1885). Accord: Russell v. State, 37 So. 2d 233, 251 Ala. 263 (1948); United States ex rel. McCline v. Meyering, 75 F.2d 716 (7th Cir. 1934); Collins v. Traeger, 27 F.2d 842 (9th Cir. 1928); Ex parte Hart, 63 Fed. 249 (4th Cir. 1894).

There being no indictment in the instant case, the issue is whether the demanding state has produced a valid affidavit. Specifically, does the affidavit of Leonard Halik, subscribed and sworn to before Helen M. Saunders, Notary Public, qualify?5/ Emphatically, the answer is negative.

The United States Supreme Court recognized that the appellation of magistrate would include a notary

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5/ At the hearing before Judge Holtzhoff, the Assistant United States Attorney, representing the appellees, tentatively suggested that the state warrant qualified as the affidavit. Notwithstanding the merits of Argument THREE hereinafter, this argument is plainly untenable. Bruzaud v. Matthews, 93 U.S. App. D.C. 47, 207 F.2d 25 (1953); U.S. ex rel. McCline, supra; Ex parte Owen, 136 P. 197, 10 Okla. Cr. 284, Ann. Cas. 1916A 522 (1913).

public, provided the laws of the state where the crime was committed permitted it. Compton v. Alabama, 214 U.S. 1 (1909). Therein, rendition of the accused was demanded by the State of Georgia from the State of Alabama. An affidavit made before a Georgia notary public was submitted in support of the demand. By writ of habeas corpus, the petitioner raised the issue here in point.

The Supreme Court decided against the petitioner, but only after it was satisfied that the laws of Georgia substantiated a finding that a notary public was a judicial officer. The court pointedly referred to the statutory provision that a notary public was ex officio a justice of the peace with apparent jurisdiction over civil and criminal cases.

Implicit in the decision, of course, is that petitioner-fugitive is entitled to his discharge if the notary public is not deemed to be a magistrate. There are no decisions of this Court on point, but several other appellate tribunals have so ruled.

In Deering v. Mount, 22 S.E. 2d 828, 194 Ga. 833 (1942), the question presented was whether the provisions of the federal statute on interstate extradition are sufficiently satisfied when the affidavit is made before a notary public of the demanding state (Vermont). The Georgia court said:

"Since, in the present case, the affidavit sup-

porting the request was sworn to and subscribed before a notary public, who, under the laws of the demanding state, where the affidavit was executed, is neither a magistrate nor an officer having judicial powers, we think the affidavit was not sufficient to give the executive of the asylum state jurisdiction to grant the requisition. Hence, the warrant granted by the Governor of Georgia on such requisition was void. It was error, on habeas corpus, to deny discharge of the relator on this ground." 22 S.E. 2d at 832.

Ex parte Owen, supra, concerned a writ of habeas corpus challenging an extradition request from the Governor of Oklahoma to the Governor of Iowa. Again, because the supporting affidavit was made before a notary public, the relator was discharged:

> "The statutes of the State of Iowa were offered in evidence, and from them it appears that a notary public has no judicial power except to swear witnesses and take depositions.
>
> "Therefore, under the authorities heretofore quoted, we have no discretion, but must hold that the affidavit in the case does not comply with the statute, and is not worth any more than so much blank paper." 136 P. at 200.

In accord: Ex parte Goodwin, 384 S.W. 2d 874, Tex. Crim. App. 1964; Denny v. Foster, 52 S.E. 2d 596,

204 Ga. 872 (1949); People ex rel. Lipshitz v. Bessenger et al., 75 N.Y.S. 2d 392, 273 App. Div. 19 (1947); People ex rel. LaRue v. Meyering, 191 N.E. 318, 357 Ill. 166 (1934).

Turning to the facts of appellant's case, the Maryland Code, 1957, Article 68, Sections 3 and 4 does not ordain the notaries public of that state with any judicial powers. Indeed, the Maryland authorities would seem to be bound by the printed statement set forth in the papers forwarded by the Governor in support of their demand for appellant. Among what purports to be a declaration of the Maryland Rules of Practice, it is set forth that a notary public is not a magistrate. (Supplemental Record).

Accordingly, the affidavit is worthless. The requisition is fatally defective, and appellant should have been discharged from custody on the writ of habeas corpus.

TWO. THE ARREST OF APPELLANT ON THE FUGITIVE WARRANT WAS ILLEGAL BECAUSE THAT WARRANT WAS FATALLY DEFECTIVE.

Appellant was arrested at the expiration of a sentence of 120 days imposed by the Court of General Sessions. The authority for that arrest was the fugitive warrant issued on January 26. That warrant was defective for several reasons, as can be readily shown.

In the first place, the Fourth Amendment declares that no warrant shall issue unless there be a showing of probable cause. The Supreme Court has amplified this to require, at a minimum, that a n e utral and detached magistrate make the determination whether or not to issue the warrant. It is further required that he draw an independent conclusion upon a statement of the facts. Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480 (1958).

The provisions of D.C. Code §23-403 implement the constitutional directive, in much the same manner as Rules 3 and 4 of the Federal Rules of Criminal Procedure. In particular, the statute emphasizes the prerequisites of (a) complaint on oath or affirmation, (b) made by a credible person, and (c) a description of the offense.

By these standards, the complaint and affidavit of Detective Michaelson taken together do not establish probable cause. There is no averment of personal knowledge; there is no averment of facts in support of the detective's statement that "to the best of my knowledge and belief this is a true warrant." The state warrant was not annexed to either document, and the facts and circumstances of the alleged forgery were not disclosed. In short, no basis exists for crediting Detective Michaelson.

No matter what may be the answer to these arguments, it is obvious that the fugitive warrant was based

solely on the representation by a local police officer that a warrant had been received from another jurisdiction. To approve this practice or procedure would be to relegate both the local police force and the judges of the Court of General Sessions to mere "rubber-stamp" functionaries. But that is forbidden explicitly by the Supreme Court. See Aguilar v. Texas, supra. Also, it is contrary to D.C. Code, §23-403.

As outlined above, the statute establishes certain conditions on which a fugitive warrant may issue. For example, a complaint is required "setting forth the offense." This is the very same thing, stated in a different way, as Fed. R. Crim. P. 3: "The complaint is a written statement of the essential facts constituting the offense charged?"

It must be noted that it is not an offense to be a fugitive. Therefore, the statutory language must necessarily refer to the crime alleged by the demanding state. Quite clearly, the papers filed in support of the fugitive warrant do not evidence any of the facts giving rise to the charge against appellant in Maryland.

Secondly, the complainant must be a credible person. In amplification, this requires that the complainant set forth what facts are personally known to him, what facts have been reported to him, and what reasons he has to support his belief in the truth of such

reports. Aguilar v. Texas, supra. The only facts represented to the magistrate[6/] were that an offense had been committed in Rockville, Maryland; that it was committed on January 13, 1966; that the alleged fugitive was named in a state warrant on a charge of forgery; and, that the state warrant had been received by the local police.

Accordingly, the magistrate was not informed that the complainant himself had any knowledge of the offense, or that the complainant was relying on any source of information other than the state warrant. Without further elaboration, the credibility of the complainant for the purposes of the fugitive warrant in question is totally destroyed by the misrepresentation of the date of the offense. For the offense in Maryland was committed on November 26 as evidenced by the state warrant. It would appear that the complainant had not even personally reviewed the state warrant, and it is obvious that it was not reviewed by the magistrate. Therefore, the magistrate improvidently issued the fugitive warrant.

Thirdly, the statute requires that a fugitive warrant shall issue only for a person charged in another

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6/ For convenience of argument, the term magistrate will be used in reference to the Judge of the District of Columbia Court of General Sessions who issued the warrant.

jurisdiction. Again, the determination is one for the magistrate. Aguilar v. Texas, supra. But, in the instant case, there was no evidence before the magistrate that appellant was charged in Maryland. The state warrant was not submitted for the magistrate's consideration; there was no explanation for its absence. The victim of the alleged crime was not identified, nor was the date of the offense designated. No reason was advanced to the magistrate why he should determine from a chain of police activity that someone, somewhere had in fact filed a criminal charge against appellant.

Finally, the fact that the fugitive warrant was issued in blank provides an additional reason, albeit technical, why the warrant is defective. The issue thus presented is whether the defect can be disregarded because the name of appellant is stated elsewhere on the same physical piece of paper. Appellant submits that it cannot, and relies on the constitutional requirement that a warrant must itself designate with particularity the person to be seized. U.S. Const., Amend. IV. Cf. Moore's Federal Practice - Cipes, Criminal Rules, §4.04.

It may well be argued that appellant may not challenge the legality of his arrest on March 30 because the issue is mooted by the extradition proceedings. Stallings v. Splain, 253 U.S. 339 (1920); Herzog v. Colpoys, 143 F.2d 137, 79 U.S. App. D.C. 81 (1944); Travis v. People,

308 P. 2d 997, 135 Col. 141 (1957); People ex rel. Mack v. Meyering, 385 Ill. 456, 189 N.E. 494 (1934).

In rebuttal, however, the opinion of the Supreme Court in Stallings concerning the defects in original arrest and commitment was by way of dicta. In Herzog, the facts were substantially different. Petitioner in that case challenged the legality of the revocation of his pardon by the Governor of Maryland, and did not specifically claim his arrest in the District of Columbia had been illegal.

Moreover, both cases arose before the enactment into law of D.C. Code §23-401(c) on June 29, 1953. The plain import of the statute does not qualify in any way the right to test the legality of the arrest. Accordingly, there does not appear to be any bar to appellant's contention on this issue.

> "Habeas corpus is the proper process for testing the validity of the arrest and detention by the authorities of the asylum state for extradition purposes." Johnson v. Matthews, 182 F.2d 677,679, 86 U.S. App. D.C. 376 (1950).

Even assuming arguendo that formal extradition proceedings moot the illegalities of prior detention, appellant made timely application pro se for a writ of habeas corpus on April 1 and again on April 7. This was during the period of illegal detention, and subsequent events not chargeable to him should not be utilized to

estop his claim.

THREE. THE ARREST OF APPELLANT ON MARCH 30 WAS ILLEGAL BECAUSE THE FUGITIVE WARRANT WAS BASED ON A STATE WARRANT THAT WAS ISSUED WITHOUT PROBABLE CAUSE.

Once again, the standard established for probable cause is found in the pronouncements of the Supreme Court, applying the constitutional safeguard to the conduct of state as well as federal officers. Aguilar v. Texas, supra. That standard, as amplified in Argument TWO hereinabove, need not be repeated.

It is submitted that the state warrant falls short of the requirements in several respects:

a) There was no complaint and/or affidavit submitted in support thereof;

b) The recital on the face of the warrant is conclusory and not factual;

c) The recital does not even suggest the source of the information credited to D/Cpl. Heflin.

d) The recital does not set forth any facts to support the conclusion that the undescribed check was forged or uttered in violation of law.

A comparison between the face of the state warrant and the affidavit of Mr. Halik demonstrates completely the difference between a minimum showing of probable cause (the affidavit) and the rubber-stamp action of

a magistrate. Cf. People ex rel. Cornett v. Warden of City Prison of Brooklyn, 112 N.Y.S. 492, 60 Misc. 525 (1908):

> "The informant simply swears to his belief without stating the ground thereof or the sources of information which would lead thereto. He should have incorporated in the information the facts upon which his belief was based, to enable the court to judge of its sufficiency... The unsubstantiated belief, surmise, guess, suspicion, or intuition of a police official is not a charge of crime."
>
> "...That the fugitive must be charged with crime (which means charged lawfully by a person who has knowledge of its commission, or is possessed of information, which he must state under oath, which would lead a reasonable and fair mind to infer its commission) is the primary and indispensable requirement to the institution of proceedings against a fugitive from justice of a foreign jurisdiction...."
>
> "Suspicion is not enough, and information and belief are not enough, unless facts are stated showing the source of the information and the grounds of belief. The information should fairly warrant the inference by the magistrate that in good faith and on reasonable grounds the complainant believes that a definite crime has been committed by a designated person." (Citation ommitted)
>
> "...It is important that the proper demands of other states should be respected, fugitives should be apprehended, and crime should be punished; but it is far more important that unauthorized arrests should not be countenanced." 112 N.Y.S. 493-494.

Appellant further points to the fact that the Governor of Maryland forwarded an affidavit of April 1, 1966, and no other, to support a requisition that was also founded on a state warrant issued January 13, 1966. It has been held that the affidavit required by 18 U.S.C. §3182, must be an affidavit made before the magistrate who issues the warrant. Ex parte Rubens, 238 P. 2d 402, 73 Ariz. 101, cert. den. 344 U.S. 840 (1951).

It follows then, that before the magistrate issues the original warrant, he must have an affidavit establishing probable cause. It is no argument to answer that Maryland law requires neither complaint nor affidavit in support of a warrant. Cf. Scarlett v. State, 93 A.2d 753, 201 Md. 310, cert. den. 345 U.S. 955 (1953). For one thing, state law will not prevail whenever federal law governs the issue, as it does in interstate extradition. For another thing, the state warrant was obviously issued on the knowledge that appellant was in custody in the District of Columbia, as evidenced by the seven-week delay between the date of the offense and the issuance of the state warrant.

FOUR. APPELLANT WAS ERRONEOUSLY REFUSED AN OPPORTUNITY TO ESTABLISH THAT THE EVIDENCE OF HIS IDENTITY WAS THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

Fed.R.Crim.P. 41(e) authorizes a motion to supress in the district where the search took place, which motion can be entertained at the "trial or hearing." Appellant raised the issue before Judge Bryant and the matter should have been fully explored by an evidentiary hearing. No authorities have been discovered covering the issue raised on extradition, but it would appear to be the proper application of the rule enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920):

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." p. 392.

There having been no hearing at all, of couse, this court cannot evaluate whether such a motion had substantial merit. However, the facts of record constitute a prima facie showing that extradition resulted from the fact of appellant's arrest in this jurisdiction on December 15. Notably, there is the delay from the date of offense until a state warrant was issued. There is also the delay between appellant's arrest and the issuance of the state warrant. There is the absence of any obvious ready identification of the appellant as "John D. Webb," the name used by the individual who passed the check. There is the fact that appellant was charged with

Forgery in the District of Columbia and the charge was dismissed.

All told, there is ample corroboration for the allegations that appellant was the victim of an illegal search, that certain property was illegally seized, and that such property was utilized to incriminate appellant as the man previously known to Mr. Halik as "John D. Webb."

FIVE: APPELLANT WAS ERRONEOUSLY DENIED THE ASSISTANCE OF A HANDWRITING EXPERT WHO, AS CLAIMED BY APPELLANT, COULD HAVE ESTABLISHED THAT APPELLANT DID NOT ENDORSE THE CHECK, AS TESTIFIED TO BY THE SOLE EYEWITNESS TO THE ALLEGED OFFENSE.

At the hearing on the requisition, Mr. Halik testified that appellant endorsed the check in his presence. Appellant did not testify but, in representing himself, vigorously denied the allegations and requested the assistance of a handwriting expert to resolve the issue. This request should have been granted.

Appellant concedes that this issue, at first blush, involves the question of his guilt or innocence, which is not an issue to be aired in extradition. However, the gravamen of appellant's present contention is that he was denied the opportunity to present evidence which could have persuaded Judge Bryant that the Maryland authorities clearly had the wrong man.

After all, there is nothing to connect appellant as "John D. Webb" except the testimony of Mr.

Halik based on facial recognition. This was first done several weeks after the offense with the aid of police photographs. Considering the possibilities of error, the testimony of a handwriting expert, excluding appellant as the endorser of the check, may well have ended the case. Cf. People ex rel. Samet v. Kennedy, 140 N.Y.S. 2d 466, 285 App. Div. 116 (1955); Lincoln v. State, 85 A.2d 765, 199 Md. 194 (1952).

As the absence of authority indicates, this is a novel issue for this court. Apparently, it has never been considered elsewhere. However, extradition is but one function of the criminal process. Recent years have borne witness to a dramatic recognition that the rights of the indigent accused shall not wither from failure of exercise. Appellant respectfully submits that his circumstances justified an extension of the equal protection doctrine, and that the District Court should have appointed him the services of an expert witness.

CONCLUSION

For the reasons set forth in Arguments One, Two and Three, the order of the District Court should be reversed with directions to discharge appellant from custody. In the alternative, for the reasons set forth in Arguments Four and Five, the order of the District

Court should be reversed with directions to hold a full evidentiary hearing, and to accord to appellant the opportunity to secure the necessary witnesses.

Respectfully submitted,

John A. Briley, Jr.

John A. Briley, Jr.
Legal Aid Agency
601 Indiana Avenue, N. W.
Washington, D. C. 20004
783-5700

Counsel for Appellant
(Appointed by the District Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the office of the United States Attorney this 30th day of August, 1966.

John A. Briley, Jr.

John A. Briley, Jr.

Statement Pursuant to Rule 41(j)

With respect to Argument ONE, appellant desires the court to read the following pages of the reporter's transcript of the proceedings: Habeas Corpus No. 189-66, pages 23-25, inclusive.

With respect to Argument TWO, appellant desires the court to read the following pages of the reporter's transcripts of the proceedings:

Habeas Corpus No. 189-66, pages 7-9, inclusive,13.

No. 14-66, Requisition Docket, pages 4-5, inclusive.

With respect to Argument FOUR, appellant desires the court to read the following pages of the reporter's transcripts:

Habeas Corpus No. 189-66, pages 9-10, inclusive, 20-21, Inclusive;

No. 14-66, Requisition Docket, page 6-12, inclusive, 18;

With respect to Argument FIVE, appellant desires the court to read the following pages of the reporters' transcripts:

Habeas Corpus No. 189-66, pages 10, 21.

No. 14-66, Requisition Docket, pages 7-10 inclusive, 14.